IN THE

Supreme Court of the United States

October Term, 1978

No. 78-233

PERSONNEL ADMINISTRATOR OF THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,
Appellants,

v.

HELEN B. FEENEY,
Appellee.

On Appeal from the United States District Court for the District of Massachusetts

BRIEF *AMICI CURIAE* OF

The National Organization for Women, NOW Legal Defense and Education Fund, The American Jewish Committee, Equal Rights Advocates, Inc., Federally Employed Women's Legal and Education Fund, League of Women Voters of the United States, National Federation of Business and Professional Women's Clubs, National Women's Political Caucus, Women's Equity Action League Educational and Legal Defense Fund, and Women's Legal Defense Fund

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Interest of *Amici Curiae*

This brief is filed on behalf of the National Organization for Women, NOW Legal Defense and Education Fund, The American Jewish Committee, Equal Rights Advocates, Inc., Federally Employed Women's Legal and Education Fund, League of Women Voters of the United States, National Federation of Business and Professional Women's Clubs, National Women's Political Caucus, Women's Equity Action League Educational and Legal Defense Fund, and Women's Legal Defense Fund, with the written consent of the parties as provided in Rule 42 of the Rules of this Court.

Each of these groups is a national organization interested in assuring equal opportunity and the equal protection of the laws for all citizens of the United States. They share a deep concern that the extreme form of veterans' preference challenged in this case constitutes invidious discrimination against women, erecting a virtually insurmountable barrier to equal opportunity for women in a significant range of government jobs and ensuring the perpetuation of past institutionalized discrimination against women.

Summary of Argument

I

This case is exceptional. First, the Massachusetts veterans' preference statute is not apiece with other laws measured by this Court against an equal protection yardstick, or with other forms of statutory preferences existing today, for while it may be neutral in form, it is not neutral in fact. It is inextricably tied to a system of explicit laws

and regulations classifying individuals on the basis of their sex, inevitably making the preference statute itself gender-based.

Second, this case is limited in scope to challenging the far-reaching, absolute, permanent preference granted by Massachusetts to veterans applying for public jobs. It presents the question whether there are any limits to how far a state may go in granting preferential employment opportunities to veterans at the expense of women.

II

The class of veterans is virtually all male as a result of gender-based laws and regulations which have severely limited opportunities for women to enter military service—an obvious prerequisite to obtaining veteran status. The structural impact of these gender-lines is incorporated in the Massachusetts veterans' preference statute, making the preferred class 98% male and creating an insuperable barrier to public employment opportunities for women. The challenged veterans' preference statute operates to heap additional economic disadvantages on a class that is defined by an immutable birth characteristic and already has been victimized by severe discrimination in the employment sector. Massachusetts' absolute, permanent veterans' preference statute is unavoidably sex-based, implicitly discriminating against women—not by operation of language but by operation of law.

Washington v. *Davis* is distinguishable, and should not be construed to require further proof of discriminatory intent in this case. Any pretense of neutrality should be

rejected because the challenged system is so firmly rooted in past and present discrimination and builds so conspicuously upon blind assumptions and stereotypes about women. Because the Massachusetts statutory preference incorporates *de jure* discrimination and reflects deeply imbedded traditional notions about women, proof of intent should not be required.

If, however, such proof is required here, the district court correctly concluded that it has been established. The court pointed to five objective factors indicating discriminatory intent—the facial non-neutrality of the statute; the history indicating the legislature's awareness of the devastating impact on women; the absence of any relationship between civil service job performance and the discriminatory gender-based military entrance requirements; the statistical evidence that the statute excludes women from a wide range of desirable civil service jobs; and the absence of any affirmative effort by the State to overcome this inevitable effect on women. The natural, foreseeable and inevitable effect of this law is a public workforce comprised of two distinct groups: men in the higher-grade, higher-paying policy positions, and women in the "pink collar ghetto" of lower-grade, lower-paid traditionally "female" jobs. This evidence securely satisfies the discriminatory intent requirement.

III

The gender-based classification inherent in the Massachusetts veterans' preference law is subject to the heightened standard of review developed by this Court in cases involving explicit gender lines. The challenged law fails to

withstand this review because it is not substantially related to the achievement of important governmental objectives. It is not sufficiently tailored to serve any of the objectives asserted by the State. The challenged law is too far sweeping to survive equal protection scrutiny.

ARGUMENT

I

Introduction

This case presents the Court with an opportunity to determine whether there are any constitutional limits to how far a state may go in granting preferential employment opportunities to one discrete group of individuals—veterans—at the expense of a second definable group—women—which has been victimized by a long and unfortunate history of pervasive discrimination in the employment sector.[1]

In the context of public employment in Massachusetts, such sex-based discrimination has been blatantly imposed by a system which perpetuates the effects of laws and regulations severely limiting women's access to military service—an obvious prerequisite to obtaining status as a "veteran" and the accompanying preference for state government jobs. As a result, the Massachusetts public

1. There is ample evidence that the effects of this severe discrimination, already noted by this Court, *e.g.*, in *Frontiero* v. *Richardson*, 411 U.S. 677, 689 nn.22, 23 (1973), persist. In 1976, for example, the median income of women who worked full time was $8,312, only 60% of the average earnings of men. U.S. Bureau of the Census, Current Population Reports, Series P-60, No. 107, *Money Income and Poverty Status of Families and Persons in the United States: 1976* (*Advance Report*), Table 7 (Sept. 1977). During that same year, veterans enjoyed a median income of $12,830. Veterans Administration, *Annual Report Administrator of Veterans Affairs 1977*, 4.

workforce has two distinct classes of employees: one is male and occupies the higher-grade, higher-paying policy making positions; the other is female, and occupies the lower-grade, lower-paying positions, such as clerical jobs for which males either have chosen not to apply or which the state had considered (prior to 1971) as women's work. *Feeney* v. *Massachusetts*, 451 F. Supp. 143, 149 (D. Mass. 1978) (App. 263); Agreed Statement of Fact ¶20 (App. 79-80).

This case is exceptional in two important respects. First, the challenged Massachusetts veterans' preference statute is not apiece with any law previously measured by this Court against an equal protection yardstick.[2] At the purely semantic level, the Massachusetts statute is, perhaps, not gender-based; that is, the preference is not expressly granted to "men" only. But neither is the statute

2. Indeed, there may be no other instance today of a statutory preference similarly closed to a class of individuals, where eligibility for class membership is so inextricably tied to laws based on an immutable birth characteristic such as gender. The uniqueness of the preference challenged here is underscored by the analogies offered by the Solicitor General in his *amicus curiae* brief. If Massachusetts' extreme veterans' preference is rejected, the Solicitor General suggests, preferences for farmers ("overwhelmingly white and male"), poor persons ("proportionately more black and Hispanic"), former convicts ("predominantly male") and the elderly ("unusually likely to be female") would be implicated. Brief for the United States as *Amicus Curiae* at 21, 34. But *amici* are aware of no law which prevents anyone from being a farmer, a poor person, a convict, or from growing old. *Cf. Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 313-314 (1976).

A more apt analogy would be the tying of current voter registration to prior voting eligibility, where such eligibility had been defined by law in a discriminatory way. The Court has struck down this type of arrangement in the past. *See, e.g., Guinn* v. *United States*, 238 U.S. 347 (1915). *See* Fleming & Shanor, "Veterans' Preference in Public Employment: Unconstitutional Gender Discrimination?," 26 *Emory L.J.* 13, 26 n.45 (1977).

gender-neutral in defining the preferred group in terms of criteria that men and women are equally capable of satisfying under law. *Anthony* v. *Massachusetts,* 415 F. Supp. 485, 498 (D. Mass. 1976) (App. 219). The legal impediments to women qualifying as "veterans" must be read into the term itself. If the statute is neutral in form, it is not in fact. By operation of law, it is gender-based.

A second prominent feature of this case is its limited scope. The broadly-operative, absolute, permanent employment preference granted to veterans by Massachusetts is the sole focus of Helen Feeney's challenge and the holding of the district court. *Feeney* v. *Massachusetts,* 451 F. Supp. at 145, 150 n.16 (App. 255, 265). Less extreme employment preferences are not at issue,[3] nor are other forms of veterans' benefits, such as loans, pensions and educational benefits.[4]

3. The Solicitor General's effort to group other types of veterans' employment preferences as implicated with the Massachusetts scheme is not persuasive. Brief for United States as *Amicus Curiae* at 2. Statutory preferences which grant additional points to veterans' scores and/or provide a time limit for exercising the preference are far less sweeping than the Massachusetts system. *Anthony* v. *Massachusetts,* 415 F. Supp. at 499 (App. 219-220). Narrowly focused positional preferences like those granted by the federal government to disabled veterans, 5 U.S.C. §3313 (1970), and/or for a limited number of realtively low-level positions, 5 U.S.C. §§3310 (guards, messengers, elevator operators, custodians), 3313 (lower grades in federal civil service) (1970), similarly are distinguishable from the Massachusetts law, which effectively bars at least 98% of the State's women from the most desirable civil service jobs. *See Anthony* v. *Massachusetts,* 415 F. Supp. at 498 (App. 218-219). *Cf. Feinerman* v. *Jones,* 356 F. Supp. 252, 259-60 (M.D. Pa. 1973) (citing Pennsylvania Supreme Court case which sustained moderate veterans' preferences but invalidated those found excessive).

4. These benefits also are plainly distinguishable. Most notably, unlike the Massachusettts public employment preference, the cost of these benefits is widely shared by the entire tax paying public. They

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This Court grappled last term in *Regents of University of California* v. *Bakke* with the "serious problems of justice connected with the idea of preference itself." 98 S.Ct. 2733, 2752-53 (1978). Mr. Justice Powell noted the "measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making." *Id.* at 2753. Helen Feeney and other Massachusetts women should not be forced to bear the devastating burden of the extreme preference here.

Sensitivity to the claims of women to fair treatment at the hands of the government, and application of the standard of review for gender-based classifications developed by this Court, require the conclusion that the Massachusetts law violates the Fourteenth Amendment's guarantee to all persons of the equal protection of the laws. By effectively denying employment opportunities to women who have had virtually no opportunity to enter military service and thereby qualify as veterans, the Massachusetts absolute, permanent veterans' preference goes too far to pass constitutional muster.

do not place a disproportionate burden on an identifiable class of individuals—women—which has already been disadvantaged in employment by a lengthy history of severe and pervasive discrimination. *See* Blumberg, *"De Facto* and *De Jure* Sex Discrimination under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment," 26 *Buffalo L. Rev.* 1, 9 (1976-1977). *Cf. Regents of University of California* v. *Bakke,* 98 S. Ct. 2733, 2756 (1978) (distinguishing preferences which result in a "denial of the relevant benefit" from those which do not).

II

The Massachusetts veterans' preference statute discriminates on the basis of gender.

A. Because of laws and regulations limiting the eligibility of women for participation in the military, the Massachusetts veterans' preference statute prefers a class that is overwhelmingly male.

The Massachusetts veterans' preference statute grants veterans an absolute and permanent preference for a significant portion of the State's civil service positions.[5] Mass. Gen. Laws c.31, §23 (1971). Once a veteran demonstrates a certain minimum competence, he goes directly to the top of the list of those eligible for these state jobs, each and every time. In some cases, a new examination is given during the life of the "eligibles" list (App. 75). If any new veterans are added, they too are placed at the top of the list, pushing even further behind any non-veterans who may have scored higher on job-related criteria (App. 75). This is true even though the non-veteran applied and qualified earlier for the job.

The class of individuals benefited by the Massachusetts preference is defined in a way that inevitably makes it overwhelmingly male. This reality is not the *de facto* result of any random or impartial method of selection, but is the inherent and inescapable consequence of the fact that veteran status can be acquired in only one way: service in the nation's armed forces. The Massachusetts selection formula for government employees therefore is inexorably

5. Approximately 60% of all positions in the Massachusetts government are subject to the veterans' preference law (App. 71-72).

tied to *de jure* federal discrimination against women in the military. *Feeney* v. *Massachusetts*, 451 F. Supp. at 145 (App. 254).

Women's participation in the military has been severely limited throughout American history. *See generally* M. Binkin and S. Bach, *Women and the Military* 4-21 (1977). Prior to 1942, except for the enlistment of approximately 10,000 women in the Navy during World War I, women were allowed in the military only as nurses (App. 84). During most of the post-World War II period, women have been limited to a maximum of two per cent of all armed forces personnel.[6] Women are still limited by regulation to no more than two per cent of Army personnel. 32 C.F.R. §580.4(b) (1977). In addition, until 1975 women were excluded entirely from the military academies. Pub. L. No. 94-106, 89 Stat. 538 (1975) (amending 10 U.S.C. §§4342, 6954, 6956 and 9342).

Entrance qualifications have remained more stringent for women than for men. In some branches of the armed services, women still face higher minimum age standards[7]

6. *See, e.g.*, 10 U.S.C. §§3209(b) (limiting the Army's female commissioned officers to no more than two per cent of their male counterparts), 3215(b) (Army female enlisted members), 8208(a) (Air Force female commissioned officers) (1959). These sections were amended November 8, 1967, to repeal mandatory limits and to authorize the respective Secretaries to prescribe limits on female personnel. 10 U.S.C. §§3209(b), 3215(b), 8208(a) (Supp. 1978).

7. *See, e.g.*, 32 C.F.R. §571.2(a)(1), (2), (7) (1977) (Army minimum age limits of 18 for men (17 with parental consent) but 21 for women (18 with parental consent)); 32 C.F.R. §888.5(a) (1977) (same gender-based differential for Air Force, except that where state law sets the age of majority at less than 21, no parental consent is required for a woman over 18 who has reached majority). These differentials persist in the regulations despite the enactment in 1974 of a law equalizing enlistment age requirements for men and women. 10 U.S.C. §505(a) (1975).

and higher educational requirements.[8] Women, but not men, are ineligible for the Army if they have responsibility for the care of a child under the age of eighteen, 32 C.F.R. §571.2(d)(4) (1977), or if they are married, 32 C.F.R. §571.2(f)(4)(i) (1977).

While this Court has not yet been called upon directly to decide the constitutionality of legislative and regulatory classifications excluding women from a wide range of career and service opportunities in the military, the structurally discriminatory impact of such classifications —which is the only matter we seek to establish here—has been recognized. *See Schlesinger* v. *Ballard,* 419 U.S. 498, 508 (1975). *See generally* M. Binkin and S. Bach, *Women and the Military* 1-21 (1977).

In 1978, the District Court for the District of Columbia invalidated on equal protection grounds legislation which excluded Navy women from assignment to sea duty on vessels other than hospital ships and transports.[9] *Owens* v. *Brown,* 455 F. Supp. 291 (D.D.C. 1978). Judge Sirica described the provision as "effectively plac[ing] a ceiling on the level of female recruitment by the Navy," and noted that "[t]he practical effect of this limitation is that a disproportionately small number of women will have the opportunity to embark upon a career whose successful

8. *See, e.g.,* 32 C.F.R. §571.2(c)(1), (2) (1977) (Army has no general minimum educational requirement for males, but requires female applicants without prior service to be high school graduates or pass an equivalency test).

9. The government's failure to perfect an appeal from *Owens* v. *Brown* (for which the time has expired) casts some doubt on the assertions in the Solicitor General's brief that the government believes gender-based distinctions in the military are constitutional. Brief for United States as *Amicus Curiae* at 19-20, 38, 39 n.31.

completion carries with it numerous and economically significant veterans' benefits and preferences." 455 F. Supp. at 295.

Regardless of the outcome of such direct challenges to gender-based classifications excluding women from the military, there is no justification for the incorporation of these gender lines in the Massachusetts public workforce. *See* pp. 24-25, *infra.* Any assertion of "Congress' broad discretion in the realm of military affairs", Brief for United States as *Amicus Curiae* at 19-20, cannot be extended to permit these gender distinctions to spill over into the civil sector. To the contrary, "[a] *cordon sanitaire* should be drawn around the armed forces' utilization of sex-based classifications." Blumberg, *supra,* 26 *Buffalo L.Rev.* at 51.

Instead, the gender distinctions in federal military laws and regulations combine with the Massachusetts veterans' preference law to create an insuperable barrier to women seeking to break out of traditional roles in the civil sector. Because of the gender lines restricting access to military service, the individuals who qualify for the absolute and permanent veterans' preference comprise a class that is indisputably more than 98% male. Agreed Statement of Facts ¶31 (App. 83).[10] The result is the relegation of

10. The lack of 100% identity between the classification "veteran" and "male" does not negate its gender-bias. Appellants' reliance on this Court's treatment of pregnancy in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), Brief for Appellants at 33-35, is misplaced, for *Aiello* does not require or even offer support for the conclusion that the Massachusetts law is "gender neutral." *See Anthony* v. *Massachusetts,* 415 F. Supp. at 495 n.8 (App. 212-213).

In contrast to *Aiello,* where it was determined that no class was disadvantaged at all (417 U.S. at 496-97), here a large advantage in employment opportunities to a virtually all male class has been

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virtually the entire class of females seeking Massachusetts state jobs to "inferior legal status without regard to the actual capabilities of its individual members." *Frontiero* v. *Richardson,* 411 U.S. at 687.

B. The Massachusetts veterans' preference statute invidiously discriminates against women.

1. The challenged statute implicitly discriminates against women, and further proof of discriminatory intent should not be required to trigger equal protection scrutiny.

In context, the classification "veterans" in the Massachusetts absolute, permanent preference statute is unavoidably sex-based. The classification inevitably discriminates deeply and pervasively against women as a result of a congeries of laws, regulations and practices which define as overwhelmingly male the class of individuals who qualify as

demonstrated beyond peradventure. *Anthony* v. *Massachusetts,* 415 F. Supp. at 495 n.8 (App. 212-213); Fleming and Shanor, *supra,* 26 *Emory L.J.* at 31-32. At least ninety-eight per cent of all Massachusetts women are excluded from this class. *See Anthony* v. *Massachusetts,* 415 F. Supp. at 498 (App. 218-219). Dissenting Judge Murray computes the percentage of excluded women at 99%. *Id.* at 504 n.5 (App. 232).

Further, this Court has recognized more than a "semantic" distinction between the benefits involved in pregnancy disability plans and the deprivation of employment opportunities in issue here. *See Nashville Gas Co.* v. *Satty,* 434 U.S. 136 (1977). Notably, where the different treatment of pregnant women places a burden on employment opportunities, even that classification has been understood to be gender-based. *Id.* at 142.

Finally, this Court's view of pregnancy as a unique "physical condition", *Aiello,* 417 U.S. at 496 n.20, and as temporary, voluntary and desired, *General Electric* v. *Gilbert,* 429 U.S. 125, 136 (1976), has no application to the classification here. The almost total exclusion of women from the preferred class, mandated by gender-based military laws and regulations, is not voluntary, desired, or temporary, nor is it related to any unique physical condition.

veterans. *Cf. Lane* v. *Wilson,* 307 U.S. 268 (1939) (neutral voter registration statute automatically registering voters in 1914 election found to be discriminatory because of laws preventing blacks from voting in 1914); *Guinn* v. *United States,* 238 U.S. 347 (1915) ("grandfather clause" discriminatory because of prior laws prohibiting blacks from voting); Tribe, *American Constitutional Law,* §16-16 (1978) (citing, *inter alia, Reitman* v. *Mulkey,* 387 U.S. 369 (1967)).

This Court's holding in *Washington* v. *Davis,* 426 U.S. 229 (1976), should not be extended here to impose an additional burden on appellee to establish further proof of discriminatory intent. That case dealt with a facially neutral testing procedure challenged as racially discriminatory because of its disparate effect on black applicants; there was no allegation or proof of any intent to discriminate. *Id.* at 235. Racially disproportionate impact, standing alone and without regard to whether it reflects a racially discriminatory purpose, was found insufficient to render the official act unconstitutional or even to trigger strict scrutiny. 426 U.S. at 239. The test assailed was not found to be "culturally slanted to favor whites." *Id.* at 235 (citing the lower court's opinion). This Court found no discrimination in the test itself, its purpose or its administration.

The Massachusetts veterans' preference statute differs significantly from the testing procedure in issue in *Washington* v. *Davis.* The statute challenged here is not neutral in design or operation. The group of individuals granted exclusive preference is inextricably tied to and necessarily controlled by decades of intentional explicit gender-based

discrimination in the armed forces.[11] This discrimination has been described as "worse than that in *Washington* .... While in *Washington,* blacks were kept off the police force by low test scores reflecting a pervasive educational disadvantage, here women were denied jobs because they did not have a status that they had been prevented by law from obtaining." L. Tribe, *American Constitutional Law* 101 (1979 Supp.) (discussing *Feeney*).

The Massachusetts veterans' preference statute thus bears scant resemblance to a genuinely neutral statute, for it is rooted in, builds upon and exacerbates past and present discrimination. To attempt to force this statute into rigid categories of either explicitly biased classification or facial neutrality would deny reality. This Court has long recognized the difficulties inherent in forcing constitutional analysis into strict ritualistic categories. *See Vlandis* v. *Kline,* 412 U.S. 441, 458 (1973) (White, J., concurring).

The Massachusetts veterans' preference statute, by incorporating *de jure* discrimination into its superficially neutral classification of veterans, constitutes invidious discrimination with only a gossamer veil. Only by ignoring the inevitable impact of the laws, regulations and practices which effectively define the class "veterans" as "male" can any illusion of neutrality be maintained. This Court has pierced such illusions in the past, *see Lane* v. *Wilson,* 307 U.S. at 275-276; *Guinn* v. *United States,* 238 U.S. at 364, and should do so again here.

11. The District Court appropriately considered the effects of the federal laws on the state system. *See* Blumberg, *supra, 26 Buffalo L. Rev.* at 49-51. *Cf. Gaston County* v. *United States,* 395 U.S. 285 (1969) (evidence that county deprived blacks of equal educational opportunities may be considered for effect on state literacy test).

The pretense of neutrality should be rejected particularly where, as here, the incorporated discrimination rests on blind assumptions and stereotypes about women. As this Court has recognized, classifications by gender are often based on pernicious role-typing of women and serve to perpetuate rigid, out-moded stereotypes. *See Craig* v. *Boren,* 429 U.S. 190, 198-99 (1976); *Stanton* v. *Stanton,* 421 U.S. 7, 14-15 (1975); *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 651-53 (1975); *Schlesinger* v. *Ballard,* 419 U.S. 498, 507 (1975). The same repressive role-typing is evident here.

The pattern of excluding women from the military is deeply rooted in the "traditional way of thinking about women." *Owens* v. *Brown,* 455 F. Supp. 291, 306 (D.D.C. 1978). It is based upon "overbroad generalizations," *Schlesinger* v. *Ballard,* 419 U.S. at 507, about the "traits, behavior and capabilities of the different sexes." *Owens* v. *Brown,* 455 F. Supp. at 308. The absolute preference granted by Massachusetts to veterans guarantees the perpetuation of these stereotypes. It translates the exclusion of women from military employment opportunities into a similar foreclosure of civil merit system jobs, "seiz[ing] upon a group—women—who have historically suffered discrimination in employment, and rely[ing] on the effect of this past discrimination as a justification for heaping on additional economic disadvantages." *Frontiero* v. *Richardson,* 411 U.S. at 689 n.22.

Further, gender-based assumptions must be understood to underlie any asserted legislative indifference to the disparate impact of the veterans' preference on women workers. The Massachusetts legislature could ignore this impact only by accepting traditional notions about women's employment (*e.g.,* that women do not work "outside the home"

and are "unsuited" for certain jobs), and women's economic needs (*e.g.*, that their needs are "satisfied by male relatives"). *See* Blumberg, *supra*, 26 *Buffalo L. Rev.* at 54. Indeed, the Massachusetts legislature's reliance on such notions is seen clearly in the early preference legislation which allowed for separate requisitioning of women to fill certain positions, and which operated "to preserve stereotypically 'female' clerical jobs for women." *Feeney* v. *Massachusetts*, 451 F. Supp. at 148 n.9 (App. 260-261). These same provisions permitted appointing authorities to specify the certification of all male lists for other jobs. *See* Exhibits 64-79, as referred to in ¶21 of the Agreed Statement of Facts (App. 80-81) (job notices specifying vacancies for males). By authorizing such gender-based designations, the legislature codified the assumptions that the occupational spheres of men and women should be separate and segregated according to sex and that there are certain jobs for which men are ill suited and women eminently suited, such as typist, file clerk or charperson. *See* Blumberg, *supra*, 26 *Buffalo L. Rev.* at 54.

Because such assumptions and stereotypes are so deeply imbedded in our society, requiring proof of legislative intent to discriminate against women might leave many statutes intact, even though they effectively and purposefully differentiate on the basis of sex. *See Craig* v. *Boren*, 429 U.S. 190 (1976); *cf. Taylor* v. *Louisiana*, 419 U.S. 522 (1975). As Mr. Justice Stevens has stated: "[A] traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female . . . ." *Mathews* v. *Lucas*, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting).

Indeed, this Court has never required plaintiffs to show that the legislature *intended* to discriminate against women in passing gender-based laws. *See Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Craig* v. *Boren*, 429 U.S. 190 (1976). These gender-based discrimination cases were decided by this Court after *Washington* v. *Davis* and considered statutes with explicit sex-based classifications. However, the pretense of neutrality in the Massachusetts veterans' preference scheme should not be relied upon to reach a different result, for the statute builds so conspicuously on blind stereotypes and past and present discrimination that it cannot be labelled neutral. *Cf. Gaston County* v. *United States*, 395 U.S. 285 (1969); *Lane* v. *Wilson*, 307 U.S. 268 (1939). Further proof of discriminatory intent should not be required.

2. If further proof of intentional discrimination is required, the district court correctly held that such requirement has been satisfied.

If this Court construes *Washington* v. *Davis* to require that further proof of intentional discrimination be demonstrated here, this requirement has been satisfied. As this Court recognized in *Washington* v. *Davis*, such discriminatory purpose need not appear on the face of the statute. 426 U.S. at 241. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . ." *Id.* at 242. The court below correctly considered "the totality of the circumstances" and determined that Massachusetts had acted intentionally. *Feeney* v. *Massachusetts*, 451 F. Supp. at 146 (App. 257). It pointed to five factors which, taken together, were sufficient to establish intentional discrimination against women.

First, the court noted that "[t]he factual underpinning in this case is entirely different [from that in *Washington*

v. *Davis*] .... [T]he Veterans' Preference Statute is 'anything but an impartial, neutral policy of selection with merely an incidental effect on the opportunities for women.'" *Feeney* v. *Massachusetts,* 451 F. Supp. at 147 (App. 259) (citing *Anthony* v. *Massachusetts,* 415 F. Supp. at 495 (App. 212)). This Court has recognized that the non-neutrality of selection procedures is probative of discriminatory intent. *Washington* v. *Davis,* 426 U.S. at 241.

Second, the district court examined the history of the statute, and concluded that the legislature must have been cognizant of its impact on women. In particular, it looked to an earlier enactment which provided for requisitioning only female applicants for certain positions. These requisitions were exempted from the operation of the veterans' preference statute, suggesting "an awareness on the part of the lawmakers of the predictable discriminatory impact the preference formula had on women." *Feeney* v. *Massachusetts,* 451 F. Supp. at 148 n.9 (App. 260). The district court also found that the legislature was, at the least, chargeable with knowledge of the federal discrimination against women in the military. *Id.* at 148 (App. 260).

Third, the court reasoned that the legislature must have known that military entry criteria, which have been and still are more rigorous for women than for men, are not demonstrably related to an individual's fitness for civilian public service. While insufficient by itself to show intent to discriminate, this was "one additional circumstance bearing on the question of discriminatory intent." *Id.* at 148 (App. 261).

Fourth, the court considered the heavily disproportionate impact of the statute on women. *Cf. Castaneda* v. *Partida,* 430 U.S. 482 (1977). It emphasized that although

disproportionate impact standing alone was not enough to show discriminatory intent, impact could be considered along with other indicia of intent. *Feeney* v. *Massachusetts,* 451 F. Supp. at 146 (App. 257) (citing *Washington* v. *Davis,* 426 U.S. at 242).

Finally, the district court considered the fact that, unlike the defendants in *Washington* v. *Davis,* Massachusetts had made no showing of any affirmative efforts to remedy the devastating impact the statute had on women. Again, the court noted, "[w]e emphasize that our finding of discriminatory intent is not based solely on the Commonwealth's failure to show affirmative efforts to recruit women. This is merely one of the factors we rely on in considering the totality of the circumstances." *Feeney* v. *Massachusetts,* 451 F. Supp. at 149 n.15 (App. 264).

These five factors are all objective indicia of intent. This Court has recognized the importance of objective evidence on the question of intent. *See, e.g., Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 266-68 (1977); *Washington* v. *Davis,* 426 U.S. at 253 (Stevens, J., concurring); *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1, 18 (1971). As the Fifth Circuit recently reasoned, "[t]he most effective way to determine whether a body intended to discriminate is to look at what it has done." *United States* v. *Texas Education Agency,* 579 F.2d 910, 914 (5th Cir. 1978); *see also NAACP* v. *Lansing Board of Education,* 559 F.2d 1042, 1046-48 (6th Cir.), *cert. denied,* 434 U.S. 997 (1977).

Objective evidence is particularly critical in reviewing legislative action because the subjective motivation of a legislature in passing a law is difficult, if not impossible,

to ascertain. An examination of the natural, foreseeable and inevitable effects of legislative action on a clearly identifiable protected class may produce the most reliable and probative evidence of intent. As Mr. Justice Stevens has noted, "[n]ormally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation." *Washington* v. *Davis,* 426 U.S. at 253 (Stevens, J., concurring). *See also Monroe* v. *Pape,* 365 U.S. 167, 187 (1961); *United States* v. *Texas Education Agency,* 579 F.2d at 913-14. The court below correctly analyzed the objective factors present in terms of their natural, foreseeable and inevitable effect.

The combined impact of the five factors identified by the district court—the facial non-neutrality of the statute; the history indicating the legislature's awareness of the devastating impact on women; the absence of any relationship between civil service job performance and the gender-based federal military entrance requirements; the statistical evidence that the statute excludes women from a wide range of desirable civil service jobs; and the absence of any affirmative effort by the State to overcome this inevitable effect on women—lead ineluctably to the conclusion that Massachusetts chose to benefit veterans by intentionally sacrificing on a grand scale the career opportunities of women. *Feeney* v. *Massachusetts,* 451 F. Supp. at 150 (App. 265). The *Washington* v. *Davis* requirement of intent thus has been securely satisfied in this case. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. at 266 (drawing a distinction between impact alone and impact plus other evidence bearing on intent).

III

The district court correctly found that the Massachusetts veterans' preference statute unconstitutionally denies to women the equal protection of the laws.

Gender-based classification can withstand constitutional scrutiny only when it is shown to serve "important governmental objectives" and is "substantially related to the achievement of those objectives."[12] *Craig* v. *Boren,* 429 U.S. 190, 197 (1976); *see Califano* v. *Goldfarb,* 430 U.S. 199 (1977). Since this Court's 1971 decision in *Reed* v. *Reed,*

12. The Solicitor General asserts that the State should have an opportunity to show the statute would have been enacted "even if it had no effect on women". Brief for United States as *Amicus Curiae* at 40. This argument relies on cases which offer no support for permitting such a defense in this case, and should be rejected. For example, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* which involved a specific zoning decision, merely suggested the relevance of this "same action" defense in "a case of [that] kind." 429 U.S. at 270-71 n.21 (dictum). There, if it had been necessary, the court could have examined the focused application of the relevant administrative procedure to determine whether the injury would have occurred "even had the impermissible purpose not been considered." *Id. See also Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977) (specific school board decision not to rehire individual teacher).

In contrast, the instant case involves a broad legislative classification in the statute itself, and not one peculiar application. In view of the nature of the legislative process, it would be pure conjecture whether the same law would have been approved under different circumstances. Such speculation is particularly inappropriate where, as here, sex-based assumptions and stereotypes are so deeply imbedded in the decision-making process.

Also inapposite are the other cases cited by the Solicitor General, which apply a "but for" test in the context of determining remedies for constitutional violations. *See Carey* v. *Piphus,* 435 U.S. 247 (1978); *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406 (1977).

In any event, even if appellants did have the burden of proof asserted by the Solicitor General, they clearly have failed to satisfy it here, and would be unable to do so given the history of the Massachusetts veterans' preference system.

404 U.S. 71 (1971), the only situation in which gender-based classification has survived constitutional challenge has been where the classification is reasonably designed to compensate women for the effects of prior discrimination. *See, e.g., Califano* v. *Webster,* 430 U.S. 313 (1977).

The "heightened scrutiny" applied by this Court to gender-based classifications is particularly appropriate where, as here, the challenged classification results in an absolute and permanent denial to women of equal access to a broad range of the most desirable public employment opportunities. Although this Court has never characterized public employment as a "fundamental interest," it has demonstrated special sensitivity to discrimination against women in employment. *See, e.g., Nashville Gas Co.* v. *Satty,* 434 U.S. 136, 142 (1977); *Stanton* v. *Stanton,* 421 U.S. 7, 14-15 (1975); *Schlesinger* v. *Ballard,* 419 U.S. 498, 508 (1975); *Frontiero* v. *Richardson,* 411 U.S. 677, 689 n.22 (1973).

The fact that the heightened review standard has been developed in cases involving explicitly gender-based classification does not diminish its appropriateness in the instant case of implicitly gender-based discrimination. As discussed above, the discrimination at issue in this case results from a congeries of laws, regulations and practices which define the class of "veterans" as 98 per cent male. Like in *Reed, Frontiero* and *Stanton,* the discrimination here is by operation of law and results from sex-based assumptions and stereotypes which type-cast women as inferior and subordinate to men. Further, the challenged preference constitutes a marked departure from the firmly

rooted principle that "advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual." *Regents of University of California* v. *Bakke,* 98 S.Ct. at 2785 (Brennan, White, Marshall and Blackmun, JJ., concurring in the judgment in part and dissenting). To justify such a departure, this Court's review under the Fourteenth Amendment should be searching.

Accordingly, at a minimum, Massachusetts must demonstrate that its statute is "substantially related" to the accomplishment of "important governmental objectives" if the challenged veterans' preference law is to pass constitutional scrutiny. This inquiry includes consideration of the suitability of the particular means chosen by the state to achieve its objective. *See Craig* v. *Boren,* 429 U.S. at 211 (Powell, J., concurring); *Frontiero* v. *Richardson,* 411 U.S. at 688-90; *Feeney* v. *Massachusetts,* 451 F. Supp. at 145 (App. 255); Note, "The Supreme Court 1976 Term," 91 *Harv. L. Rev.* 1, 184, 187 (1977).

Massachusetts argues that the governmental objectives for its veterans' preference statute were: "(1) to reward those who have sacrificed in the service of their country; (2) to assist veterans in their readjustment to civilian life; and (3) to encourage patriotic service." Brief for Appellants at 24. An examination of each of these interests, however, reveals that the statutory scheme of preference chosen by the state does not achieve these objectives in a manner compatible with the equal protection requirement. The challenged law fails to satisfy the fair and substantial relationship test because it is both underinclusive and over-

inclusive. *Cf. Jimenez* v. *Weinberger,* 417 U.S. 628, 637 (1974).

With respect to the first asserted objective, *i.e.,* "rewarding" those who have sacrificed in the service of their country, the statutory preference does not bestow a benefit upon all veterans but limits the reward to those who seek employment in the public sector. Nor does the statutory classification relate the reward to any measurement of the sacrifice, since it rewards veterans without regard to the type or length of their service. While these factors alone might not indicate the constitutional vulnerability of the preference scheme, they do provide the backdrop for the critical flaw: the Massachusetts statute imposes the cost of its unfocused reward disproportionately "upon female competitors for scarce higher echelon public jobs." Fleming & Shanor, *supra,* 26 *Emory L.J.* at 49; *see* Blumberg, *supra,* 26 *Buffalo L. Rev.* at 69.

Nor does the challenged statute fairly and substantially serve the objective of assisting veterans in their readjustment to civilian life. No correlation has been demonstrated between the grant of the absolute, permanent preference and the veteran's need for rehabilitation or reintegration into the workforce. Evidence produced in this case underscores this point. On three of the eligibility lists examined, two-thirds of the veterans receiving preference had been discharged more than 20 years ago (App. 106, 150-151, 169-170) (of the 99 veterans for whom discharge dates were available, 42 left the military in the 1940's, and 21 in the 1950's). Clearly, the Massachusetts preference persists far beyond the point where there can

be any tenable claim that a rehabilitative or reintegrative purpose is served.[13]

Finally, there is even less of a relationship between the challenged classification and the asserted objective of encouraging patriotic service.[14] It is far too speculative to assume that the *ex post facto* grant of preference served as any inducement for the thousands of male veterans who enlisted in anticipation of the draft; certainly it did not for those who were drafted. "It would be surprising if any statistically significant group would risk the dangers of war in order to gain preferential treatment in public employment." Fleming & Shanor, *supra,* 26 *Emory L.J.* at 50 (footnote omitted).

At best, the Massachusetts statute furthers the asserted government objectives—assuming, *arguendo,* that they are legitimate—only in the grossest of ways. As the district court noted, "[s]uch a broad-brush approach may be administratively convenient, but mere administrative convenience is not a legitimate basis for benefiting one identifiable class at the expense of another." *Feeney* v. *Massachusetts,* 451 F. Supp. at 145 (App. 255); *see Reed* v. *Reed,* 404 U.S. at 76-77.

The district court correctly found that the correlation between the challenged statute and the achievement of the

13. Indeed, the more recent veterans who arguably need reintegration most are denied its benefits because the eligibility lists are so heavily weighted with senior veterans.

14. The legitimacy of this objective is subject to question, since the Armed Forces is more appropriately a federal than a state concern. Fleming & Shanor, *supra, 26 Emory L.J.* at 61-63; Blumberg, *supra, 26 Buffalo L. Rev.* at 15 n.71.

asserted objectives is not grounded "on a convincing factual rationale." *Feeney* v. *Massachusetts,* 451 F. Supp. at 145 (App. 255). Massachusetts has failed to tailor its veterans' preference statute carefully to constitutionally accomplish the purposes it sought to achieve. The challenged statute is both overinclusive and underinclusive in its scope and operation and it does not bear a fair and substantial relationship to any important government objectives advanced by the State. This Court has struck down other ill-drafted statutes on numerous occasions. *See, e.g., Craig* v. *Boren,* 429 U.S. 190 (1976) (statute insufficiently tailored to the purpose of promoting highway safety); *Weinberger* v. *Wiesenfeld,* 426 U.S. 636 (1975) (classification not reasonably related to objective of providing children with parental care). It should do so again here.

The extreme form of veterans' preference enacted by the Massachusetts legislature does not represent a tolerable balance between the conflicting interests of two definable classes of individuals—aiding veterans and assuring equal employment opportunities to women. *Feeney* v. *Massachusetts,* 451 F. Supp. at 150 (App. 265); *Anthony* v. *Massachusetts,* 415 F. Supp. at 496 (App. 213). Its result is to make it "virtually impossible for a woman, no matter how talented, to obtain a state job that is also of interest to males." *Feeney* v. *Massachusetts,* 451 F. Supp. at 151 (App. 268) (Campbell, J., concurring). The district court was correct in concluding that the Massachusetts absolute, permanent preference system is too far sweeping to survive constitutional review.

Conclusion

For the reasons stated above, *amici* respectfully submit that the judgment and order of the District Court for the District of Massachusetts should be affirmed.

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